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No. 1178

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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(Because the opinion of the court below giving rise to this Petition does not state the basis of the second appeal, the Briefs filed in the court below on the second appeal accompany this Petition as Exhibits.)

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HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered January 25, 1967, affirming a judgment of the United States District Court for the Northern District of Illinois granting an employer's personal representatives exoneration from two Jones Act claims.

Citations to Opinions Below.

The opinion of the court below on what is referred to herein as the first appeal is reported in 350 F. 2d 592, and also appears as an Appendix to Appellees' Brief in the Court of Appeals which accompanies this petition.

The opinion of the court below on what is referred to herein as the second appeal which gives rise to this petition is printed in Appendix "D" hereto, *infra*, p. 17a, and is yet unreported.

Proceedings in this Court.

On petitions for certiorari from the judgment on the first appeal this Court denied certiorari. 382 U.S. 98. The order noted:

> "Mr. Justice Black is of the opinion that certiorari should be granted, the Court of Appeals judgment reversed and the District Court judgment affirmed." [Petitioners sought a review of the limitation allowance and not mere affirmance of the District Court judgment.]

Thereafter, this Court granted the motion of the American Trial Lawyers' Association to file an *amicus curiae* brief but denied a petition for rehearing. 383 U.S. 923. Subsequently this Court denied a motion for leave to file a second petition for rehearing. 384 U.S. 914.

Jurisdiction.

The judgment of the Court of Appeals on the second appeal affirming the District Court judgment which granted the petition for exoneration and dismissed the Jones Act claims was entered on January 25, 1967. Appendix "E", *infra*, p. 20a. The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1). Cases which

are believed to sustain the jurisdiction of this Court on a petition for certiorari when the Court has previously denied petitions for certiorari from a decision on an earlier appeal are: *Messenger* v. *Anderson,* 225 U.S. 436, 444; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 257-258; *Mercer* v. *Theriot,* 377 U.S. 152, 153-154; and (cf.) *Gondeck* v. *Pan American World Airways, Inc.,* 382 U.S. 25.

Questions Presented.

1. Was it necessary in order to sustain a judgment against a Jones Act employer for the District Judge to have used the words "negligence" and "proximate cause" in his findings of fact when petitioners' claims were based solely on the Jones Act and findings of proximately causative negligence were implicit in the District Judge's findings, conclusions and judgment?

2. When on remand the District Judge explained at great length that he had found that the Jones Act employer was liable because of the employer's proximately causative negligence in failing to provide a safe means of ingress to the vessel, did the Court of Appeals on appeal from a judgment entered pursuant to mandate err in failing to reconsider its former opinion which had erroneously interpreted the District Judge's findings as containing "no finding of negligence" on the part of the employer?

3. When a District Judge sitting in admiralty without a jury has found an employer liable under the Jones Act (46 U.S.C., §688) for the deaths of two seamen-employees proximately caused by the employers failure to provide a safe means of ingress to the vessel and the proofs with reason justify his conclusion that employer negligence

played some part in producing the deaths, has the Court of Appeals in reversing the District Judge and reaching its own conclusion that the seamen's deaths "were the result solely of their own gross misconduct" failed to apply the clear error test required by *McAllister* v. *United States,* 348 U.S. 19, 20?

Statutes Involved.

Statutory provisions involved are the Limitation of Liability Act, 46 U.S.C., §181-189 and the Jones Act, 46 U.S.C., §688, which incorporates by reference the Federal Employers' Liability Act, 45 U.S.C., §51-60. Their pertinent text is set forth in Appendix A, *infra,* p. 1a.

Statement of the Case.

On April 22, 1957, H. Leslie Atlass brought a proceeding in admiralty in the United States District Court for the Northern District of Illinois under the Limitation of Liability Act, 46 U.S.C., §§181-189, for exoneration from or limitation of liability under the Jones Act, 46 U.S.C., §688, for the death by drowning on October 26, 1956, of two seamen employed by him.

After a trial before the Court sitting in admiralty without a jury on petitioners' Jones Act claims the District Judge entered findings of fact and conclusions of law (Appendix B, *infra* p. 4a) and a judgment (Appendix C, *infra* p. 15a) denying exoneration but limiting liability to the value of the vessel.

Petitioners' husbands drowned (each under different circumstances) when returning to their employer's pleasure yacht, which, on a voyage from Chicago to Florida, had run aground and was then cradled on a marine rail in Detroit, Michigan to facilitate an inspection for any damages. Although dining and toilet facilities

were ashore, the yacht's crew, including Muth and Darr, continued to be quartered on board the vessel. (Appendix B, *infra* p. 7a)

The District Judge found that access to the railbed from shore was hazardous particularly at night and that considering the debris and other obstacles on the walkway, dock, and railbed, and the hazards created by a thirty-two inch gap between the walkway and the railbed and differences of levels between the walkway and the railbed that the lighting of the walkway, dock, and railbed at the time of the drownings was insufficient. Appendix B, *infra,* p. 8a, 10a.

The District Judge concluded that under the Jones Act an employer is liable for deaths of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel and denied exoneration. Appendix B, *infra,* p. 12a.

The District Judge found that the employer "personally, who was in Chicago," at the time of the drownings, was without responsibility for the hazardous condition of the walkway, dock, and railbed as it existed at the time of the drownings and allowed limitation of liability. Appendix B, *infra,* p. 10a, 12a.

The District Judge found that Muth and Darr were in part responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drownings, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock, and railbed and of the gaps, differences in levels, and poor lighting. Appendix B, *infra,* p. 10a.

The District Judge prepared his own findings of fact. Prior to entering judgment, petitioners moved the District Judge to amend the findings to make more specific findings of negligence and proximate cause which were otherwise implicit in the findings and conclusions. This motion was denied. (Record 120, 122, 143)

The District Judge had stated orally:

> "I have concluded that Mr. Atlass the owner of the yacht was their employer on a borrowed servant basis and therefore he is liable under the Jones Act if there is any failure to provide a safe place to work or a safe means of ingress and egress to and from the vessel. I have concluded that there was not a safe place of ingress and egress to the vessel under the conditions as indicated by the evidence both with respect to lighting and the conditions on the dock itself, the scaffolding, the stanchions, the ropes, planks, and other debris as well as the lighting * * *. It is a combination cause of the conditions of the individuals and the conditions of the premises * * *." (C. of A. App. 6a)

On the first appeal, the Court below interpreted the District Judge's findings as containing "no finding of negligence on the part of any person except Muth and Darr" (350 F. 2d 598-599) or on the part of any of his employees or agents. (350 F. 2d 599) The Court below interpreted the findings as apparently *exonerating* Atlass "from *all* responsibility for the asserted negligent conditions existing at the time of the occurrence." (350 F. 2d 599) The Court below concluded that the two seamen were intoxicated to a greater extent than that found by the District Judge (350 F. 2d 596) and that such intoxication was "gross misconduct," (350 F. 2d 596) barring recovery under the Jones Act (350 F. 2d 597).

The Court below marshaled eight authorities in which the respective *trial* courts had exonerated the employer from any negligence on the facts before them, to wit: *Farrell* v. *United States, et al.*, 336 U.S. 511; *Wiper* v. *Erie Sand SS Company*, 293 F. 2d 491; *Schlicter* v. *Port Arthur Towing Company*, 288 F. 2d 801; *Barlow* v. *Pan Atlantic SS Company, et al.*, 101 F. 2d 697; *The SS Berwindglen*, 88 F. 2d 125; *Landy* v. *United States, et al.*, 101 F. Supp. 486; *Jackson* v. *Pittsburgh SS Company*, 131 F. 2d 688; and *Meintsma* v. *United States*, 164 F. 2d 976, 977 (350 F. 2d 596, 597, 601). It concluded that "the deaths of Muth and Darr were the result solely of their own gross misconduct" and that the District Judge erred in his refusal to exonerate Atlass of all liability. It reversed and remanded for further proceedings not inconsistent with the opinion. (350 F. 2d 601)

Petitioners filed separate petitions for certiorari. (Nos. 709 and 733 in the October, 1965 Term of this Court.) The petitions were denied. (382 U.S. 98) A joint petition for rehearing was denied. (383 U.S. 923) A motion for leave to file a second petition for rehearing was denied. (384 U.S. 914) Thereafter the mandate of the Court of Appeals issued.

In proceedings on remand the District Judge stated that he *had* found and concluded that there was negligence on the part of Atlass (C. of A., App. 20a-21a); that his finding that access to the railbed from shore was hazardous particularly at night was intended to be a finding of negligence (C. of A., App. 23a-24a); that he could not understand how the Court of Appeals could recognize with respect to negligence that the employer has a duty to provide seamen in his employ with safe and seaworthy appliances and a safe place to work and then find that

a finding which says that "access to the railbed was hazardous" is not a finding of negligence on the part of the shipowner (C. of A., App. 24a-25a); that his finding that access was hazardous and that it was not a safe place to work was intended to be the equivalent of a finding of negligence (C. of A., App. 26a); that if the Court of Appeals said that he did not find any negligence or any causation it was inconsistent with what he found (C. of A., App. 26a). The District Judge said that he found negligence in the Jones Act sense of failure to provide an adequate and safe place in which to work (C. of A., App. 28a); that such finding was contained in his finding No. 27 (C. of A., App. 28a); that in his opinion his findings were sufficient (C. of A., App. 29a); that in his opinion the test is that the employer has a duty to provide a safe place in which to work, that if he does not provide that there is negligence in law (C. of A., App. 31a); that the employer's duty to provide a safe place to work was not met (C. of A., App. 32a); that the negligence did not constitute affirmative acts, it constituted the employer's failure to provide a safe place to work (C. of A., App. 32a); that he did not see how one could come to any other conclusion than that it was implicit in the judgment denying exoneration that the hazardous conditions were a cause of the deaths. (C. of A., App. 38a)

The District Judge, recognizing his obligation to follow the mandate, (C. of A., App. 39a), entered a judgment granting the petition for exoneration and dismissing the Jones Act claims. (C. of A., App. 35a)

On appeal from such judgment petitioners contended in the court below, that the "law of the case" rule does not limit the power of the Court of Appeals to review

its holding on the exoneration issue presented by the former cross-appeal. *Messenger* v. *Anderson,* 225 U.S. 436, 444; and that the clarification of his findings by the District Judge in the proceedings on remand demonstrated that the decision of the Court of Appeals on the former cross-appeal was based upon a complete misconception of the District Judge's findings.

Respondents contended in the Court below, (1) that the Court's sole duty was to examine the decree entered by the District Judge to determine whether it conformed to the Court's mandate and if it did to dismiss the appeal with costs. *Stewart* v. *Salamon,* 97 U.S. 361, 362; *Aspen Mining & Smelting Company* v. *Billings,* 150 U.S. 31, 37; and (2) that the District Judge denied exoneration on a theory of unseaworthiness "without negligence."

Petitioners' Reply Brief argued again (1) that the "law of the case" rule was no longer an inexorable rule. *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. 2d 577, 580 (7th Cir. 1924); *Mantle Lamp Company of America* v. *Knapp-Monarch Company,* 81 F. 2d 428, 430 (7th Cir. 1936); *Connett* v. *City of Jerseyville,* 110 F. 2d 1015, 1018 (7th Cir. 1940); *McGovern* v. *Eckhart,* 200 Wis. 64, 227 N.W. 300, 67 A.L.R. 1381; and (2) that the District Judge explained that though he found that Atlass and his employees did not affirmatively cause the hazardous conditions he did determine that the employer, Atlass, was negligent in failing to provide a safe, adequately lighted means of access. Petitioners argued that although the hazardous conditions were not caused by the employer or his agents, other than the shipyard, that there was negligence of omission in failing to correct the condition so as to provide a safe access for the seamen. Petitioners argued that denial of exoneration

did not require a double finding of negligence: it did not require the trial court to find that the employer caused the unsafe conditions which would be negligence of commission; it required that the negligence of the employer in allowing the unsafe conditions to continue was negligence of omission which caused in part the deaths of Muth and Darr.

The Court below composed of the same panel that decided the first appeal rendered a *per curiam* opinion affirming the judgment of the District Judge as rendered in accordance with its mandate on the first appeal.

The *per curiam* opinion does not inform the reader of the occasion for the second appeal. The briefs in the Court below are filed herewith as Exhibits.

Reasons for Granting the Writ.

As noted in the Brief of the *amicus curiae* filed herein, (383 U.S. 923) in connection with the former petition for certiorari, the findings of the District Judge contained "no expressed and well-articulated finding of fact that the employer or his agents had been negligent in their conduct" and "there was no expressed and well-articulated finding of fact that the negligence assuming such to have existed had played a part in causing the accident."

On remand when petitioners asked the District Judge to make additional findings in accordance with his oral explanation of his findings, he refused, saying:

> "That the Court of Appeals concluded whatever negligence there may have been or my failure to find negligence *per se* in such language even though I said it was hazardous, etc., was not a safe place to work, which so far as I am concerned is the equivalent, I am not going to play semantic games with the Court of Appeals * * *." (C. of A. App. 26a)

The widow and three children of Clem Muth and the widow and three children of Kurt Darr do not understand "semantic games." They have been deprived of their normal lives because of the failure of their husbands' and fathers' employer to provide his crew with a safe place of employment including an adequately lighted means of access to the vessel where employed. Because of the Court of Appeals' misinterpretation of the District Judge's findings they have further been deprived of substantial monetary damages and a review on the limitation issue. The Muth family damages were $129,554.98 before reduction for contributory negligence, and $58,527.49 after such reduction. The Darr family damages were $148,676.51 before reduction for contributory negligence, and $100,323.56 after such reduction. The erroneous allowance of limitation further reduced the combined damages to $50,000. (App. *infra,* 15a-16a)

The source of this deprivation is believed to be the failure of the District Judge and the Court below to apply principles established by this Court. The District Judge assumed that an individual employer, as opposed to a corporate employer, was entitled to limit his liability to the value of his pleasure yacht if he did not personally create the hazardous conditions at the shipyard where he quartered his crew while his yacht was undergoing minor repairs and was not personally present at the moment of the drownings.

This assumption is quite contrary to the well recognized view that *privity* or *knowledge* includes "some personal knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting an appropriate means to prevent it." *Lord* v. *Goodall SS Co.* (1877), 115 Fed. Cases, No. 8506, Affirmed

(1880) 102 U.S. 541, and therefore Atlass as sole owner-employer was never entitled to the benefit of limitation of liability.

The misunderstanding by the Court below of the principles of limitation of liability was even more pronounced. It assumed that the Limitation of Liability Act had something to do with contributory negligence. Thus, it said in the first opinion:

> "The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr." *In re Atlass' Petition,* 350 F. 2d 592 (7th Cir., 1965)

The Court below compounded the District Judge's misconception of the Limitation of Liability Act by reading the finding on the *limitation* issue that Atlass was not *personally* responsible for the hazardous conditions as one *exonerating* the employer "from *all* responsibility for the asserted negligent conditions existing at the time of the occurrence." *In re Atlass' Petition,* 350 F. 2d 592, 593 (7th Cir., 1965).

The court below failed to comprehend the fact that for purposes of the Jones Act the shipyard was Atlass' agent. (350 F. 2d 599) (C. of A., 29a); *Hopson* v. *The Texas Company,* 383 U.S. 262, 263-264. It determined that the conduct of Muth and Darr was "gross misconduct" barring recovery under the Jones Act contrary to *Bentley* v. *Albatross S. S. Co.,* 203 F. 2d 270, 272-274 (3rd Cir. 1953) and *McDonough* v. *Buckeye S. S. Co.,* 103 F. Supp. 473, aff'd 200 F. 2d 558 (6th Cir. 1952).

Petitioners sought to show in their previous petition for rehearing that because of the development of the St.

Lawrence Seaway the number of admiralty cases now being filed in the Seventh Circuit is increasing at a faster rate than the national level. They also sought to show that the Court of Appeals for the Seventh Circuit has not yet been affected by this increase in admiralty litigation. For this reason and others it was urged that it was extremely important that decisions such as this (which because of their scarcity in the Circuit will be regarded as landmark decisions) be correct.

The opinion of the court below on the first appeal ignored the principle announced in *McAllister* v. *United States,* 348 U.S. 19, 20). It completely confounds the Limitation of Liability Act. Yet, it is a landmark in and for the Seventh Circuit and undoubtedly will lead district courts required to follow the decision into repeated error. The second opinion of the court below contributes nothing to legal edification. In effect it puts the circuit back to a pre-*Messenger* v. *Anderson* (1912) era.

On the former petition for certiorari, petitioners' argument was characterized as "extravagant and unwarranted assertion and assumption." It was said:

> "The whole thrust of assertion and insinuation (and elision) in the petitions is that the trial court did not make findings of fact that it did make and that it made findings of fact that it did not make as just pointed out. Upon that false base they erect a *non sequitur* that the Court of Appeals held things that it did not hold."

In effect, petitioners' statements to this Court were discredited by respondents as misrepresentation. The proceedings on remand before the District Judge establish without doubt that petitioners' representations were true.

Unless this Court grants certiorari and corrects a grave injustice to two families, it appears that other seamen's families in the Seventh Circuit will be imposed upon in like manner.

Petitioners respectfully suggest that the circumstances of this case call for an exercise of this Court's discretionary review. For ten years, petitioners have been asserting Jones Act claims which require proof of proximately causative negligence. They have proceeded under no other theory always recognizing that in order to maintain their claims that it was incumbent upon them to prove negligence and proximate cause. The trier of fact determined that they did just that. The evidence, had it been reviewed in accordance with the rule in *McAllister* v. *United States,* would have sustained such determination. It is a travesty that petitioners should be denied recovery because of what has been characterized as "semantic games." The result here is believed to be more "recrudescense" of legal jargon intended to deprive employees of rights which Congress intended to give them by remedial, welfare legislation. See *Tiller* v. *Atlantic Coast Line R. Company,* 318 U.S. 54, 62-67; *Cox* v. *Roth,* 348 U.S. 207, 210.

The importance of the questions presented is further illustrated by the interest of the Admiralty Bar in this petition. See Appendix F, *infra,* p. 22a.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that their petition be granted.

Respectfully submitted,

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APPENDIX A.

STATUTES.

46 U.S.C. §183 (a)

"The liability of the owner of any vessel, * * * for any act, * * * done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1474.

46 U.S.C. §187

"Nothing in sections * * * 183 * * * of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or seamen, for or on account of * * * any negligence * * * of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." R.S. §4248.

46 U.S.C. §688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by Jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating

the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

45 U.S.C. §51

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C. §53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence

shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C. §54

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

APPENDIX B.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(entered June 12, 1964)

This cause having come on for trial before this Court and memoranda having been submitted by all parties hereto, and being fully advised the Court now enters the following findings of fact and conclusions of law:

Findings of Fact

1. On October 26, 1956, at about 2:45 a.m., Clem Muth and Kurt Darr died from asphyxia by drowning in the Detroit River, Detroit, Michigan.

2. Muth was born on May 3, 1915. He and claimant Catherine E. Muth (who was born March 27, 1919) were married on November 25, 1944. Three children were born to them: Clem William, born November 29, 1947, Patricia, born December 27, 1951, and Phyllis, born February 9, 1954.

3. At the time of his death, Muth was employed by The Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS"), in Chicago as a maintenance painter. He had been so employed for 4½ years. He was the president of Local 180, Painters District Council No. 14.

4. Darr was born on December 30, 1909. He and claimant Mollie Darr (who was born November 7, 1915) were married on May 4, 1935. Three children were born to them: Leighton, born June 16, 1938, Raymond, born December 16, 1943, and Janice, born February 28, 1946.

5. At the time of his death, Darr was employed by CBS in Chicago as an electronic technician. He had been employed by CBS and its predecessor corporation for 24 years. He was a member of the International Brotherhood of Electrical Workers.

6. Immediately prior to their deaths, neither Muth nor Darr was suffering from any disease or physical handicap apparent to a layman. Both knew how to swim.

7. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. The following persons, among others, were aboard at that time:

(a) H. Leslie Atlass, vice president of CBS in charge of its Chicago office, who was the registered owner of the "Sis" from the time he purchased her in 1947 until his death in 1960;

(b) Muth and Darr;

(c) Frank E. Johnson, a purchasing agent employed by CBS in Chicago;

(d) Raymond Mendel, Acting First Mate and Assistant Engineer of the "Sis", employed by Atlass;

(e) Robert L. Smith, engineer of the "Sis", employed by Atlass;

(f) John Wasilas, a painter employed by CBS in Chicago.

8. The "Sis" was a licensed pleasure yacht with a registered length of 101.5 feet, width of 19.2 feet and depth of 11.1 feet. Her gross and net tonnage were, respectively, 131.64 and 89.00 tons. She had two 16 cylinder pancake-type engines with a total of 2400 registered horsepower. Sleeping accommodations on board included a master stateroom, six bunks in the crew's quarters and officers' quarters which slept two.

9. At various times prior to October, 1956, CBS employees Muth, Darr and Wasilas had performed work aboard the "Sis" including painting, adjusting electronic equipment and handling lines on short Lake Michigan runs.

10. Shortly before the "Sis" sailed for Florida, Muth and Wasilas had applied one coat of paint to the hull,

resanded and revarnished the sides of the cabins and wheelhouse and painted the top deck. An additional two coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida.

Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65 foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively, east of the shed's west wall. The northernmost and southernmost fixture in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three men proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water. Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permanent connection with the relevant voyage of the "Sis".

35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drownings, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

41. Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount.

In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.00.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24.63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years, 6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.

Conclusions of Law

1. The Court has jurisdiction over the instant litigation.

2. Muth and Darr were seamen within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of their deaths. See Carumbo v. Cape Cod S. S. C., 123 F. 2d 991 (1st Cir. 1941).

3. From October 18, 1956, when the voyage commenced, to and including the time of the drownings, Muth and Darr were borrowed servants of Atlass', and accordingly he was their "employer" within the meaning of the Jones Act.

4. Under the Jones Act, an employer is liable for injuries to or death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. This duty extends to an area in close proximity with the gangway or gangplank such as the place where Muth and Darr drowned. Cf Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

5. Negligence of seamen-employees which proximately contributes to their injury or death reduces proportionately the amount of damages which may be recovered of the employer.

6. Atlass' liability to claimants Catherine Muth and Mollie Darr is limited to the fair market value of the "Sis" as of the date of the drownings. 46 U.S.C. § 183.

7. In determining present values in this case, a discount factor of 5% should be used. In calculating interest in this case, an interest rate of 5% should be used.

8. The following damages, which must be reduced by 50% (the contribution to Muth's death of his own negligence), have been sustained by claimant Catherine Muth:

a. Muth's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. The present value of Muth's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus.

c. the present value as of his death, plus interest to date, of $500.00 per year for 24.63 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Muth's pension rights at his retirement, less the amount already received therefor by Mrs. Muth.

9. Mrs. Muth is not entitled to compensation which Muth might have received as a result of his continuing to serve as president of his union local because the duration of such term of office cannot be determined with a reasonable amount of assurance.

10. The following damages, which must be reduced by 30% (the contribution to Darr's death of his own negligence), have been sustained by claimant Mollie Darr:

a. Darr's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. the present value of Darr's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus

c. the present value as of his death, plus interest to date, of $500.00 per year for 21.04 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Darr's pension rights at his retirement, less the amount already received therefor by Mrs. Darr.

11. Mrs. Muth and Mrs. Darr are entitled to aggregate damages totalling $50,000.00. Mrs. Muth is entitled to that percentage of the $50,000.00 which her damages as described in Conclusion No. 8 reduced by the amount which she received in exchange for her covenant not to sue bear to the sum of such reduced damages plus Mrs. Darr's damages as described in Conclusion No. 10 reduced by the amount which she received in exchange for her covenant not to sue; Mrs. Darr is entitled to the remainder of the $50,000.00.

Enter:

Hubert L. Will
Judge

Dated: June 12, 1964 (Record 104-118)

APPENDIX C.

JUDGMENT ORDER

(entered June 25, 1964)

The Court having previously entered its Findings of Fact and Conclusions of Law and directed the parties to prepare a judgment Order consistent with such Findings of Fact and Conclusions of Law, makes additional Findings of Fact as follows:

8A: Muth's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), is in the amount of $44,566.08.

8B. The present value of Muth's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, is $83,073.90.

8C: The present value as of his death, plus interest to date, of $500.00 per year for 24.63 years, as compensation for services performed around the house and for parental guidance, is $7,152.66.

8D. The present value as of his death, plus interest to date, of Muth's pension rights at his retirement, less the amount already received therefor by Mrs. Muth, is $7,262.34.

The sum of 8A through 8D is $142,054.98, which, when reduced by 50% on account of contributory negligence, results in $71,027.49 before reduction by $12,500.00 for the widow's Covenant Not to Sue, and results in $58,527.49 after such reduction.

10A: Darr's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), is in the amount of $62,159.03.

10B: The present value of Muth's future lost wages from CBS employment from the present to the date of his retirement, reduced by 2%, is $80,450.37.

10C: The present value as of his death, plus interest to date, of $500.00 per year for 21.04 years, as compensation for services performed around the house and for parental guidance of $6,563.86.

10D: The present value as of his death, plus interest to date, of Darr's pension rights at his retirement, less the amount already received therefor by Mrs. Darr, is $12,003.25.

The sum of 10A through 10D is $161,176.51, which, when reduced by 30% on account of contributory negligence, results in $112,823.56 before reduction by $12,500.00 for the widow's Covenant Not to Sue, and results in $100,323.56 after such reduction.

Mrs. Muth is entitled to 36.84426% of $50,000.00, and Mrs. Darr to 63.15574% of $50,000.00, or $18,422.13 and $31,577.87 respectively.

It Is Therefore Ordered, Adjudged And Decreed that claimant, Catherine E. Muth, recover of and from the Petitioners herein the sum of $18,422.13 and costs, and claimant, Mollie Darr, recover of and from the Petitioners $31,577.87 and costs.

Enter:
/s/ H. Will
Judge

Dated: 6-25-64 (Record 140)

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15837 SEPTEMBER TERM, 1966 JANUARY SESSION, 1967

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased, and MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased,
Claimants-Appellants,
v.
HARRIET M. ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,
Petitioners-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 25, 1967

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

Per Curiam. This appeal presents this case for the second time. The suit was brought in admiralty in April, 1957, by petition of Atlass as owner of the yacht "Sis" for exoneration from or limitation of liability for the deaths of seamen Clem Muth and Kurt Darr, who were drowned while returning, from a night ashore, to the yacht, then in a shipyard in the Detroit River. Widows of the seamen, as administratrices of the decedents' es-

tates, filed answers to the Atlass petition and claims for recovery of damages under the Jones Act in May, 1957. Atlass died November 18, 1960, and his widow and the Chicago Title and Trust Company were substituted as petitioners. After a lengthy trial the district court denied the petition for exoneration, but granted a limitation of liability. Petitioners and claimants both appealed from that judgment.

On June 30, 1965, this court filed its opinion in those appeals, Nos. 14872 and 14873. *In re Atlass' Petition,* 350 F.2d 592 (7th Cir. 1965), *cert. denied,* 382 U.S. 988 (1966). We held that the deaths of claimants' decedents Clem Muth and Kurt Darr were the "result solely of their own gross misconduct"; and that the district court had erred in refusing to exonerate petitioner Atlass from all loss or damage resulting from the deaths. We reversed the judgment of the district court and remanded "for such further proceedings as are not inconsistent with this holding." *Id.* at 601.

Thereafter claimants filed a petition for rehearing in this court, which was denied. Their petition for certiorari to the Supreme Court of the United States was denied. 382 U.S. 988 (1966). They then petitioned for rehearing of the denial of certiorari. The petition was denied by the Supreme Court, 383 U.S. 923 (1966), as was a motion for leave to file a second petition for rehearing. 384 U.S. 914 (1966). The mandate of this court thereafter issued.

The mandate was filed in the district court April 12, 1966. Claimants there filed "A Motion to Clarify Findings in Accordance with the Mandate of the U.S. Court of Appeals." The district court heard extensive arguments of counsel, denied the motion May 26, 1966, and entered judgment June 24, 1966, "That the prayer of [Atlass'] petition for exoneration is granted and sustained," and assessed the claims of claimants "upon the merits and with prejudice." The appeal now before us followed seek-

ing a reversal of the district court judgment of June 24, 1966, entered pursuant to this court's mandate in Appeals No. 14872 and 14873.

We think that our previous holding in this case and the mandate issued pursuant to that holding virtually directed the district court to enter the judgment which it entered and from which the appeal before us is taken. The court would have erred if it had not entered the judgment it did enter.

AFFIRMED.

APPENDIX E.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, January 25, 1967

Before
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. J. Earl Major, Senior Circuit Judge

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased, and MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased,
Claimants-Appellants,
No. 15837 vs.
HARRIET M. ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,
Petitioners-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typed pages contain a true copy of

opinion filed January 25, 1967, and judgment entered January 25, 1967 in

Cause No. 15837

Catherine Muth, et al Administratrix

vs.

Harriet M. Atlass, et al

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 20th day of February A.D. 1967.

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.

(Seal)

APPENDIX F.

(Letterhead of Mandell & Wright, Attorneys and Counselors)
Houston, Texas

February 13, 1967

Mr. Edward G. Raszus
Attorney at Law
77 West Washington Street
Chicago, Illinois

In Re: Estate of Muth and Darr vs
Atlass et al

Dear Mr. Raszus:

I am pleased to advise you that the National Officers have authorized ATLA to file amicus curiae brief on behalf of the Administrators of the Estate of Muth and Darr. I am now considering what member of the Admiralty Section to assign the task of preparing amicus curiae brief who will do a creditable job on behalf of the important proposition which this case presents.

As I understand the problem, it seems clear that the Trial Court in effect found negligence in failing to provide a safe place to work or means of ingress or egress which he termed a failure to supply a safe place in which to work. There is no doubt that the Court in effect found negligence, yet the Appellate Court somehow felt that Court's failure to use that particular term, constituted a finding of no negligence. The record to me at least, clearly indicates to the contrary. The question as I see it, to be presented to the Supreme Court is whether the magic term "negligence" must be used by the Trial Court and the absence of such magic word must result in a verdict for the Defendant.

If you have any preference or suggestion as to whom you wish to prepare and file the brief as amicus curiae from among the members of the Admiralty Section, please advise me.

Just as soon as you finish a draft application for certiorari, please send it in to me.

I know that you are not a member of the Admiralty Section. I am herewith enclosing an application that I would appreciate your filling out and forward it to me at your earliest convenience.

Assuring you that our Section will do its utmost in this matter, I am

Very sincerely yours,
/s/ Arthur J. Mandell
Arthur J. Mandell
AJM/me

Enclosure

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No. 1178

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY TO PETITION FOR CERTIORARI

EDWARD B. HAYES
135 South LaSalle Street
Chicago, Illinois
Counsel for Respondents

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 1178

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY TO PETITION FOR CERTIORARI

There has been no new evidence since the case was here before.[1]

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[1] Petitioners' positions were fully presented and argued on this evidence (with a brief by the same *amicus curiae* promised by the present petition) in their former petitions for certiorari, and in a petition to rehear the denial of certiorari, and in the petition presented with their motion for leave to file a second petition for rehearing. These were considered by this court and denied at the October term, 1965 (Numbers 709 and 733).

For correction of certain statements of the present petition reference is made to the record and exhibits filed in

As before, Petitioners have allowed themselves to be carried away by controversial zeal into partial and inaccurate statement. On more complete statement their "Questions Presented" do not arise.[2]

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[1] (Continued)
the cause when it was pending at the October term 1965 of this court (Nos. 709 and 733); Respondents have asked and continue to ask this Court to notice and include the same as exhibits here.

[2] Abbreviated references are as follows:

Op.: The Opinion of the Court of Appeals, first appeal (Appendix A hereof)

FF: Findings of Fact by the trial court (Appendix B hereof)

A.1: Appendix printed by Petitioners Muth and Darr in the Court of Appeals, first appeal.

P.A.: Appendix printed by these respondents, Harriet M. Atlass and Chicago Title and Trust Company, in the Court of Appeals, first appeal.

P.Rhg.: The Petitioners' Joint Petition for Rehearing in the Court of Appeals, first appeal.

R.P.Rhg.: Respondents' reply thereto.

P.D.: The first Petition for certiorari of Darr.

P.M.: The first Petition for certiorari of Muth.

Reply: Reply of these respondents to Petitions for certiorari.

P.Rhg.S.Ct.: Joint Petition of Petitioners to rehear the denial of certiorari.

R.Rhg.S.Ct.: The second Joint Petition of Petitioners to rehear the denial of certiorari, tendered with their motion for leave to file the same.

P.Br.: Petitioners' brief and abstract on the Court of Appeals second appeal.

R.Br.: Respondents' reply thereto.

P.R.Br.: Petitioners' Reply Brief in the Court of Appeals.

R.Br.,2: Respondents' Brief below, 2nd appeal.

The reader of the Petition (and especially its "Question Presented" No. 3) might not realize that on the first appeal the Petitioners were Appellants, *attacking* findings of the trial court, namely, its findings that intoxication of Muth and Darr was a proximate cause of their deaths, and that Mr. Atlass personally, who had returned to Chicago the day after the yacht was put on the rail bed, was not responsible for the hazardous condition of the walkway, dock and rail bed "as it existed at the time of the drownings". (when, the trial court said, it was "obstructed," by timbers, planks, debris and other obstacles, "considering" which the lighting was insufficient.) (Op. 13a)

The Court of Appeals examined the trial court's Findings of Fact with scrupulous care, and upheld those that Petitioners attacked. (Op., *Passim*) Petitioners, therefore, are confronted here with concurrent findings below that Mr. Atlass, personally, was not responsible for any causative hazard of the walkway as it existed at the time of the drownings, and that intoxication of Muth and Darr was a proximate cause of their deaths. *Graver Tank Mfg. Co.* v. *Linde,* 336 U.S. 271, 275 (1948).

The present Petition argues that in colloquy after the remand, the District Judge indicated a mistaken belief that Mr. Atlass would not be chargeable under the Limitation Act with negligent omission to correct a proximately causative hazard (Pet. 11) This seeks to put a forced construction on offhand comments in colloquy after the case was decided that the trial court was careful to negate expressly in deciding the case. The Petition fails to advise this Court that after all the evidence on liability was heard the trial court took time to consider, and then announced

its determinations on this evidence. On the point in question it said, first:

> "I have determined that Mr. Atlass was not personally negligent in that nothing he did *or failed to do* was a proximate cause of the death of these gentlemen, and therefore the principle of limitation of liability is applicable." (Our emphasis) (A 1, 60).

It is difficult to see how the trial court could have made it any more plain on this record that it acquitted Mr. Atlass personally of any causative negligence, whether of omission or commission; it *did not find* that when he was there the walkway was "obstructed" by "timbers", "planks", "debris", and "other obstacles."[3] It did not find that *in the absence* of such "obstructions" of the walkway the lighting of the walkway was insufficient for sober, able-bodied adults merely walking there; the trial court did *not find* that the "staggering" Muth (FF 30) *was attempting to step across the gap to the rail bed.*[4] It found that the "staggering" Muth (FF 31) "fell" when he got

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[3] It found that Mr. Atlass left Detroit for Chicago on the 24th (FF 19) and that it was shortly after 2:00 A.M. on the 26th that Muth and Darr left the tavern (FF 28). It stated:

> "* * * I am satisfied that an absent shipowner, who on this record, never saw the conditions at midnight or 2:00 o'clock in the morning, who I think could not reasonably be held to have known that there were conditions which were less than adequate for safe ingress and egress, is not personally liable." (A. 1, 60)

As to imputed negligence of Mr. Atlass' servants, the Court of Appeals presently points out that there was in fact no obstruction by debris or other obstacles that interfered with Muth or Darr as they proceeded down the walkway on the later occasion, either. (Op. 13a, 14a)

[4] "There was no proof that Muth was attempting to cross the gap at that unusual point." (Op. 6a)

only 15 feet from the north end of the walkway and went down there, with only the intoxicated Darr to hold him up (FF 30, 31) and that Muth had already "fallen" and gone down a few minutes before, in the street when *both* Darr and Smith were trying to hold him up. (FF 29)

The trial court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings." (FF 41)

These findings were made by the *trial court* pursuant to its announcement after the conclusion of the evidence, as above quoted, that it had "determined that Mr. Atlass was not personally negligent in that nothing he did or failed to do was a proximate cause of the deaths of these gentlemen", etc. (*ubi supra.*)

Petitioners are still arguing, as they argued before, that the trial court could have inferred that something Mr. Atlass did or omitted was causative negligence. They do not advise this Supreme Court that the trial Judge said at the time *he decided* this case, that he had determined that nothing Mr. Atlass "did or failed to do was a proximate cause of the deaths," etc. (A 1, 60)

The Petitioners failed to show that the trial court's finding acquitting Mr. Atlass personally of causative negligence was "clearly erroneous" on this evidence, which (as the first Opinion of the Court of Appeals points out Op. 6a) *and the Petitions nowhere deny* is undisputed as to the fact that this walkway was used by Muth and Darr themselves and everybody else, including women in skirts (Op. 15a; P.A. 74, 46-47, 121) by day and by night without any trouble for many years (Op. 15a) if only they were

sober, as Muth and Darr certainly were not. (Op. 7a) That cogent evidence alone supported the trial court's acquittal of Mr. Atlass personally as to permanent conditions at the shipyard.[5] And there is much more, as the opinion points out.

On the point of causation the Petitioners repeat (Pet. 10) the argument they made before that the District Court treated this as a "combination" cause due partly to the conditions of the premises and partly to the condition of the individuals. (Please see our Reply, *passim.*)

The Petition fails to advise this Supreme Court that the Court of Appeals sharply corrected the trial Court as to the condition of the individuals *and that Petitioners have conceded the correction;* (P.Rhg. 10, P.M. 16); and that as to the condition of the premises, *neither they nor the trial court bring forward anything to challenge the correction made by the Court of Appeals.*

We suppose we do not need to repeat *in extenso* what we said before. The Court of Appeals vigorously corrected the trial court's finding (that the intoxication of Muth and Darr was a proximate cause) saying:

> "This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of

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[5] *Chicago, N.W. Ry. Co.* v. *Minneapolis, St. P. & SS.M. Ry. Co.*, 176 Fed. 237, 242 (CA 8, 1910); *Inman* v. *B. & Q. Ry. Co.*, 361 U.S. 138, 141 (1959); *Mercer* v. *N.Y. Trap Rock Corp.*, 91 F. Supp. 434, 438 (D.C.N.Y. 1950.)

> his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other." (Op. 7a)

As we pointed out when the case was here before, this was a critical correction of the trial court's finding regarding "the condition of the individuals." (Reply 10-12). It changes nothing that, after denial of certiorari and remand, the trial court also pointed to the same difference, saying it was contrary to his finding to describe Muth as being in a stupor or helpless (P. Br. 22a).[6] Petitioners did not advise the trial court, and the Petition does not advise this Court, that the "proof beyond question" above referred to by the Court of Appeals, had constrained petitioners, long since, to admit the correctness of the *Appellate* Court's view of these facts. We pointed this out in our Reply to the former Petitions (Reply p. 15).

Thus in their joint petition for rehearing to the Court of Appeals the Petitioners finally conceded:

> "Muth was helpless and, as this Court infers, *in a stupor.*" (P. Rhg. 10) (Our emphasis). And please see R. P. Rhg., *passim.*

In the former petitions to this Court the Darr petition said: "Muth apparently became helplessly [sic] intoxicated." (P.D. 5) and then discreetly passes over the intoxication of Darr—apparently forgetting that the intoxicated Darr deliberately *jumped in* after the intoxicated Muth *fell in* (FF 31); and that what is attributable to

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[6] Muth, who had fallen a few minutes before in the street when both Darr and Smith were trying to hold him up (FF 29) was the only one who fell in; Darr jumped in after him. (FF 32)

Muth's admittedly helpless intoxication is no more chargeable to these respondents than Darr's own intoxication. The Petition of Muth concedes: "Muth was admittedly [sic] in a helpless [sic] condition when he left the tavern." (P. M. 16).

As the trial court remarked in this post-remand colloquy (P. Br. 22) it was not he, but the Court of Appeals (in considering the reason for the occurrence) that found Muth was "helpless", as above quoted. This was true when the case was here before. Both the Petition for Rehearing to the Court of Appeals and the Petitions for certiorari conceded, as just quoted, that the *Appellate* Court's statement of these facts is correct. (Muth had to be practically carried; he was so drunk he had to be held up.) (A, 1 57)

We pointed to these admissions when the case was here before (Reply 10-15). Petitioners did not seek to retract or qualify them and they were not seeking to do so at the post-remand colloquy on which they place such emphasis. Quite to the contrary, they had moved the trial court after remand to "clarify" its findings, seeking to put into its mouth the theories they ask this Court to suppose the lower court embraced. The trial court again rejected them and denied the motion. In that motion *they* asked the trial court to "find":

> "1. At the time Muth, Darr and Smith left the tavern, Muth was in a helpless condition, Darr was in a near-helpless condition and Smith was sober." (P. Br. 17a)

As to "the condition of the premises" when the case was here before, we noted the holding of the Court of Appeals:

> "That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support."

and pointed out that it was "considering" debris and other obstacles on the walkway that the trial court found the lighting insufficient (Op. 13a); that on the actual record there was no debris, (P.A. 136-137) nor any obstacle (*ubi supra*) on the walkway that interfered in any manner with Muth and Darr as they proceeded along the walk to require more lighting at the place where the admittedly helpless Muth in his drunken stupor fell for the second time. (See note 3 *supra.*) Neither then nor since have Petitioners referred to *one word* in the record to the contrary. (Reply 13-14).

In sum, if defensive remarks of the trial court in colloquy after remand could ever unravel ten years of litigation this colloquy would not do it, and is not correctly represented by this Petition.

This Petition says that the trial court "said he *had* found [sic] and concluded that Atlass was negligent" (Pet. 9) which is in the teeth of the trial court's explicit statement of his determination on this evidence, when he decided the case, that nothing Mr. Atlass "did or failed to do" (A 1, 60) was a proximate cause of these deaths (*ubi supra*). This petition fails to advise this Court that the trial judge even said repeatedly that, on the point of negligence, he did not (and indeed "could" not) find negligence "in fact". (Please see our brief to the Court of Appeals, pp. 9-11 and 13-15.) It even fails to advise this Court of the extraordinary statement of the trial judge to the effect that if Muth and Darr respectively had indeed drunk themselves into helplessness and near-helplessness he could not say the Court of Appeals was wrong in hold-

ing their own gross misconduct to be the *sole* proximate cause of their deaths. (R. Br. 2, pp. 13-15)

In sum, the case is the case that was here before. Two men got drunk, one of them so helplessly drunk that he could not stand up if he were not held up whether it was noon or midnight. He fell, first in the street when two men were trying to hold him up, and a few minutes later off a dock; whereupon the other intoxicated man (then the only one trying to hold him up), jumped in after him because, as the trial court observed, he also was drunk, and both drowned.

The court below held that their own misconduct was the proximate cause of their deaths and this court denied certiorari.

There has been no change in the evidence, nor the findings on the evidence.

Respectfully submitted,

EDWARD B. HAYES,
Proctor for Respondents

ADDITIONAL APPENDIX

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

Nos. 14872-14873

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased, and MOLLIE DARR, Administratrix of the Estate of Kurt Darr, deceased,

Claimants-Appellants,

v.

HARRIET M. ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Petitioners-Appellees and Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seamen-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

"The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann,* 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor of Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of

the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson, a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by

Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the star-

board side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was joined by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith, Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht. Gildersleeve, who had been the night watchman for

thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15' from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and railbed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

> "In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his shop, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F.2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a

drunken condition. In rejecting the theory, the Court stated (page 493):

> "Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company,* 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.,* 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen; Rawding* v. *Hooten,* 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.,* 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a seaman's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others,

were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner employed a guard at the gate who was charged with the duty of refusing admission to sea-

men returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, midway on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit, as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that, the particular act performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those referred to, are:

> "No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

> "No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part

to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioners' seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, * * * at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioners' expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr

from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her

teens, stepped across that gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurrence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water, Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and

fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman, was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(entered June 12, 1964)

This cause having come on for trial before this Court and memoranda having been submitted by all parties hereto, and being fully advised the Court now enters the following findings of fact and conclusions of law:

Findings of Fact

1. On October 26, 1956, at about 2:45 a.m., Clem Muth and Kurt Darr died from asphyxia by drowning in the Detroit River, Detroit, Michigan.

2. Muth was born on May 3, 1915. He and claimant Catherine E. Muth (who was born March 27, 1919) were married on November 25, 1944. Three children were born to them: Clem William, born November 29, 1947, Patricia, born December 27, 1951, and Phyllis, born February 9, 1954.

3. At the time of his death, Muth was employed by The Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS"), in Chicago as a maintenance painter. He had been so employed for 4½ years. He was the president of Local 180, Painters District Council No. 14.

4. Darr was born on December 30, 1909. He and claimant Mollie Darr (who was born November 7, 1915) were married on May 4, 1935. Three children were born to them: Leighton, born June 16, 1938, Raymond, born December 16, 1943, and Janice, born February 28, 1946.

5. At the time of his death, Darr was employed by CBS in Chicago as an electronic technician. He had been employed by CBS and its predecessor corporation for 24 years. He was a member of the International Brotherhood of Electrical Workers.

6. Immediately prior to their deaths, neither Muth nor Darr was suffering from any disease or physical handicap apparent to a layman. Both knew how to swim.

7. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. The following persons, among others, were aboard at that time:

(a) H. Leslie Atlass, vice president of CBS in charge of its Chicago office, who was the registered owner of the "Sis" from the time he purchased her in 1947 until his death in 1960;

(b) Muth and Darr;

(c) Frank E. Johnson, a purchasing agent employed by CBS in Chicago;

(d) Raymond Mendel, Acting First Mate and Assistant Engineer of the "Sis," employed by Atlass;

(e) Robert L. Smith, engineer of the "Sis," employed by Atlass;

(f) John Wasilas, a painter employed by CBS in Chicago.

8. The "Sis" was a licensed pleasure yacht with a registered length of 101.5 feet, width of 19.2 feet and depth of 11.1 feet. Her gross and net tonnage were, respectively, 131.64 and 89.00 tons. She had two 16 cylinder pancake-type engines with a total of 2400 registered horsepower. Sleeping accommodations on board included a master stateroom, six bunks in the crew's quarters and officers' quarters which slept two.

9. At various times prior to October, 1956, CBS employees Muth, Darr and Wasilas had performed work aboard the "Sis" including painting, adjusting electronic equipment and handling lines on short Lake Michigan runs.

10. Shortly before the "Sis" sailed for Florida, Muth and Wasilas had applied one coat of paint to the hull, resanded and revarnished the sides of the cabins and

wheelhouse and painted the top deck. An additional two coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida.

Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65 foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively east of the shed's west wall. The northernmost and southernmost fixtures in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end, for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three men proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water, Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged either by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permanent connection with the relevant voyage of the "Sis".

35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drowning, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

41. Atlass, personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount. In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24-63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years, 6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.

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No. 1178

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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Motion to Use the Former Record

(Brief pp. 1-2)

Respondents have moved this Court "to use the record and exhibits in Causes Nos. 709 and 733, October Term, 1965, in connection with its present consideration of the petition for certiorari filed herein." The entire record in the court below (except, of course, the proceedings on remand which had not taken place) accompanied the former petitions. As the relief sought by the motion repre-

sents a part of the immediate relief sought by the petition for writ of certiorari, the motion is unopposed.

Respondents' Attack Upon Counsel and Omission (Brief, pp. 1-2, Appendix B)

As before, instead of discussing the questions presented, respondents' have filed a "reply brief" attacking the integrity of counsel. The character of the brief suggests, no doubt inadvertently, two additional reasons for granting the writ, i.e., to caution members of the bar of this Court in their conduct towards one another and in any attempts to mislead this Court. It is wasteful of the time of this Court for counsel to disregard this Court's rules and to submit a brief such as we here refer to as a brief in opposition.

As before (brief in opposition in Nos. 709 and 733, October Term, 1965), Appendix B of respondents' brief in opposition purports to contain the findings of fact and conclusions of law of the trial judge entered June 12, 1964. However, several pages thereof are missing. These pages were in the copies of the printed appendix in the court below on the first appeal, pp. 79-81, filed with the Muth petition, No. 709, October Term, 1965, and also appeared as an appendix, pp. 26-28a in the Darr petition, No. 733, October Term, 1965. They now may be found conveniently in Appendix B to the present petition, pp. 12a-14a.

The missing pages are believed to be important as they demonstrate the trial court's intention to deny exoneration by reason of proximately causative Jones Act negligence. The trial judge indicated his reliance upon *Marceau* v. *Great Lakes Transit Corporation,* 146 F. 2d 416 (2nd Cir. 1945), Cert. Denied, 324 U.S. 972 (1945), which was a Jones Act case. (Petition, p. 12a))

The Concurrent Findings Rule Is Not Applicable

(Brief, p. 3)

The district judge did not find *against* petitioners on the exoneration from Jones Act negligence issue. Respondents' brief in opposition erroneously suggests that the court below on the first appeal merely affirmed findings exonerating the employer so that the concurrent finding rule should dispose of this petition.

It is true that petitioners here were appellants on the first appeal. But petitioners appealed from a judgment limiting the employer's Jones Act liability to the value of his pleasure yacht. Petitioners contended below that respondents had failed to prove lack of privity or knowledge under the Limitation of Liability Act. Petitioners also assigned error to findings that the deceased seamen were, in part, responsible by reason of their own contributory negligence when they drank alcoholic beverages with knowledge that access to the vessel was hazardous. (Finding No. 40; Petition, p. 10a)

However, the court below disposed of the first appeal on respondents' cross-appeal (1) by interpreting the trial judge's findings as containing no finding of proximately causative negligence on the part of Atlass or any of his agents, (2) by interpreting Finding No. 41 (Petition, p. 10a) as apparently exonerating Atlass from all liability, and (3) by holding that the decedents' conduct was gross misconduct barring recovery under the Jones Act. It did not reach petitioners' assignments of error.

The Irrelevance of the Finding on the Limitation Issue

(Brief, pp. 3-6)

The trial judge found that the employer was not personally or individually negligent (Petition, p. 5; Finding

of Fact, 41, Petition, p. 10a) and allowed limitation of liability.

It is clear, however, that he did not intend thereby to exonerate the employer from all negligence. (Petition, pp. 7-8, 8a, 10a, 12a, 16a; Appellants' Brief and Appendix in the court below on the second appeal, pp. 20a-34a, 37a-39a.)

It is a mistake at best to take Finding No. 41 that Atlass was not *personally* responsible and interpret it as a finding that there was no employer negligence.

The District Judge explained Finding 41 prior to the first appeal:

> "That is the basis of the conclusion that he wasn't responsible; that he had no privity or knowledge." (Trans. 1655-1657, Appellants' Brief in the Court of Appeals on the First Appeal, p. 37.)

On remand, the District Judge reiterated his explanation of Finding No. 41:

> "The Court: I was not going to make any finding that there was negligence on the part of Mr. Atlass individually.
>
> "Mr. Yowell: Personally, you mean with respect to the Limitation of Liability Act.
>
> "The Court: Personally, right, because the minute I did that, then the limitation principle wasn't applicable, and I felt there hadn't been any personal negligence since he was 500 or how many miles away and had been for two days when the accident happened. He didn't know where they were going to dinner or what they were doing. It wasn't his dock, it wasn't his shipyard. I saw no reason for finding that he personally and individually was negligent. *That the area was not a safe place in which to work, that all the other things which I found, I found,* but—." (Appellants' Brief and pp. 37a-38a.) (Italics ours)

One cannot read the trial judge's extended explanation summarized in the petition at pp. 7-8 with references to the printed appendix, or the references in full or the trial judge's findings 27 and 39 and conclusion 4 (Petition, pp. 8a, 10a, 12a) and honestly deny that the trial judge held respondents liable on account of proximately causative employer negligence.

There being some employer negligence, the finding that Atlass was not *personally* responsible was irrelevant on the exoneration issue. *Rogers* v. *Missouri Pacific R.R. Company,* 352 U.S. 500, 506-507.

The Irrelevance of Employee Negligence

(Brief, pp. 6-8, 10)

Besides an attack upon the accuracy and integrity of counsel, respondents have, as before, dwelt at great length upon the condition of Muth and Darr, painting a dark picture of two derelicts. Respondents' purpose is clear, of course: why should this Court be concerned about a couple of drunks?

Upon an examination of the record, the Court would be startled with the actual character of the evidence said to establish drunkenness. See, Statement of Facts in Appellants' Brief in the court below on the first appeal, pp. 13-18, and argument thereon, pp. 44-50. Also see, the comments of the trial judge on remand, Appellants' Brief and Appendix in the court below on the second appeal, pp. 22a-23a.

But the condition of Muth and Darr and the trial court's findings thereon and the findings of the court below thereon are not relevant because there was *some* employer negligence. *Rogers* v. *Missouri Pacific R.R. Company,* 352

U.S. 500, 506-507. When on remand the trial judge explained his original intention to find that some employer negligence played a part in the deaths, the court below on appeal erred in refusing to re-examine its basis of decision.

The brief in opposition discloses no reason why the court below could not have reexamined the case nor does it disclose any reason why the writ should not be granted.

The Employer's Failure to Provide A Safe Means of Ingress

(Brief, pp. 8-9)

The statement of the court below in the first appeal that "that portion of the findings that the walkway was obstructed by timbers, planks, *debris* and *other obstacles,* is without substantial support" was a straw man. The finding thus "corrected" by the court below was contained in Finding No. 27 (Petition, p. 8a) and read:

> "Part of the five foot width of the walkway was obstructed by timbers and planks."

Note that this finding did not include a finding that the walkway was obstructed by *debris* and *other obstacles.* The trial judge also found:

> "Considering the debris and other obstacles on the walkway, dock and railbed and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and railbed at the time of the drowning was insufficient."

Evidence of debris and other obstacles on the dock and railbed was ample. It was the totality of the conditions for ingress that made access by any route hazardous (Finding of Fact 27, Petition p. 8a), and lighting insufficient (Finding of Fact 39, Petition p. 10a).

With respect to the finding as to the presence of timbers and planks on the walkway and with respect to Finding No. 39, there was substantial evidence including a stipulation of facts omitted from respondents appendix on the cross appeal on the first appeal. (Record 99-101) There were photographs showing the presence of the timbers and planks on the walkway. (See Claimants' Exhibits 41 and 42 in the Muth Reply Brief in No. 709, October Term, 1965, pp. 2a-3a) The planks were shown to be on the walkway and did obstruct part of it. (Transcript p. 220 omitted from Respondents' Supplemental Appendix in the court below on the first appeal.) They were referred to by respondents' witness, Smith. (Reply Appendix, p. 2 in the court below on the first appeal) These obstructions lay in practically total darkness. (Respondents' Supplemental Appendix in the court below on the first appeal, p. 97) They necessarily cut down the five-foot width of the walkway. It was established by respondents' own expert that only the outer two feet of the walkway received as much as .4 of a foot candle of light. (Respondents' Supplemental Appendix in the court below on the first appeal, p. 101) To the extent that the court reviewed the findings, it did not properly apply *McAllister* v. *United States,* 348 U.S. 19, 20 (1954).

With respect to the so-called extraordinary statement of the trial judge on remand (brief in opposition, p. 9) we submit that this statement demonstrated that the trial judge had a sound understanding of the clear error rule. See, Reply Brief in the court below on the second appeal, pp. 11-12.

Conclusion

It is noted that the brief in opposition contains no conclusion specifying with particularity the relief to which respondents believe themselves entitled. It otherwise fails to conform to the rules of this court. Of course, this Court will not grant a petition merely by reason of default on the part of respondents. We suggest, however, that the character of the brief in opposition inadvertently discloses substantial reasons why the writ should be granted. It is hoped that on the occasion of this petition from a judgment that would forever foreclose the rights of petitioners that no member of this Court will be deceived by respondents' semantic slight-of-hand.

Wherefore, petitioners pray that the writ be granted.

Respectfully submitted,

G. Kent Yowell
38 South Dearborn Street
Chicago, Illinois 60603

Harold A. Liebenson
Edward G. Raszus
77 West Washington Street
Chicago, Illinois 60602
Counsel for Petitioners.

FILED
MAY 27 1967
JOHN F. DAVIS, CLERK

No. 1178

In the

Supreme Court of the United States

OCTOBER TERM, 1966

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR REHEARING

G. KENT YOWELL
38 South Dearborn Street
Chicago, Illinois 60603

HAROLD A. LIEBENSON
EDWARD G. RASZUS
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Counsel for Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

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CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR REHEARING

Petitioners, Catherine Muth, Administratrix of the Estate of Clem Muth, Deceased, and Mollie Darr, Administratrix of the Estate of Kurt Darr, Deceased, petition for rehearing of the order entered herein on May 8, 1967, denying the petition for writ of certiorari.

THE AMICUS CURIAE MOTION AND BRIEF WERE WITHHELD FROM THE CONSIDERATION OF THE COURT BY THE CLERK'S OFFICE AND THUS WERE NOT PRESENTED TO THE COURT PRIOR TO ITS CONSIDERATION AND VOTE UPON THE PETITION.

Although the petition for certiorari advised this Court that the American Trial Lawyers Association considered the matter of such importance as to plan to file a brief *amicus curiae* (Petition, pp. 14, 22a-23a) such brief *amicus curiae* was not distributed to the Court prior to its consideration and vote on the petition for writ of certiorari on Friday, May 5, 1967. (Appendix, *infra,* pp. 3a-5a)

Without benefit of the motion and brief the Court may not have appreciated the national importance of this case. Moreover, it might well have occurred to individual Justices of this Court in measuring the importance of the questions presented that if the American Trial Lawyers Association did not regard the case as important enough to follow through with a promised brief that the matter was indeed not of sufficient importance for this Court to give it any consideration.

The fact is, however, that on Thursday, April 27, 1967, more than one week before the vote on the petition and only one day after all other papers had been distributed to the Court, a motion and brief by the American Trial Lawyers Association, air-mailed from New Orleans on April 25, 1967, were received by the Clerk of the Court. (Appendix, *infra,* pp. 1a, 5a)

But the Clerk neither distributed the printed motion and brief to the Court nor advised the Court of its receipt prior to the vote on Friday, May 5, 1967. (Appendix, *infra,* pp. 3a-5a)

On Tuesday, May 2, 1967, five days after the Clerk's office received the motion and brief *amicus curiae,* an associate of respondents' counsel advised Deputy Clerk Rodak by telephone and letter that there was an objection to the filing of the brief. The associate stated:

> "It is our opinion, in which we understand that you concur, that the brief is untimely, within the contemplation of Rule 42, paragraph 2, of the Rules of the Supreme Court of the United States."
>
> "This letter will, therefore, advise you that we cannot consent to the filing of this brief and will, in due course, present our formal objection thereto; in any event, on or before the 17th of May." (Appendix, *infra,* p. 2a)

The objection was spurious for the reason that Rule 42, paragraph 2, of this Court's rules, is limited to *amicus curiae* briefs on the merits. The failure of the Clerk's office to distribute the motion and brief had the effect of keeping from this Court any knowledge of the fact that the American Trial Lawyers Association was indeed concerned and interested in the importance of this case from a national viewpoint.

Rule 42, paragraph 1, the applicable paragraph, requires that a motion for leave to file when consent is refused may be filed only if submitted a *reasonable* time prior to the consideration of the petition for writ of certiorari. In this case the motion was submitted only one day after all other papers had been distributed to individual justices and eight days before the Court considered and voted on the petition for writ of certiorari. Rule 42, paragraph 1, provides that distribution to the Court of the petition for certiorari and its consideration thereof will not be delayed pending the receipt of such brief or the filing of such motion. This is similar to Rule 24, paragraph 4, relating to Reply Briefs which we understand are on occasion distributed to the Court after the other papers but nevertheless considered by the Court. The rule by implication permits the filing of such motion after the distribution of the petition for certiorari so long as it is

done a reasonable time prior to the Court's consideration of the petition for writ of certiorari which was on May 5, 1967. It further seems to us that a motion filed one day after distribution of the papers and eight days prior to the consideration and vote of the Court is timely.

However, Deputy Clerk Rodak explains that the practice of the Clerk's office is to withhold distribution of an *amicus curiae* motion and brief for twenty days under Rule 35, paragraph 4. The practice, however, does not appear to be uniform because the same *amicus curiae* filed a motion for leave to file in No. 709 and 733, October Term, 1965, on about February 15, 1966, when consent to file was also refused, yet the motion and brief were distributed to the Court immediately which considered and voted on the motion three days later on February 18, 1966, and granted it on February 21, 1966, although denying a petition for rehearing.

The provision in paragraph 3 of Rule 41, that "a party served with such motion may *seasonably* file an *objection* concisely stating the reasons for withholding consent" does not call for a *"brief in opposition."* There is no need to require twenty days to file "an *objection* concisely stating the reasons for withholding consent" as in the case of a "brief in opposition." Moreover, if such "objection" were regarded as a "brief in opposition" governed by Rule 35, paragraph 4, then in a case in which the *amicus curiae* files a motion and brief concurrently with the petition for writ of certiorari the respondent would be obliged to file a brief in opposition to the *amicus curiae* motion ten days before a brief in opposition to the petition was due. An objection contained within the brief in opposition to the petition would not be "seasonable."

As we have shown, because of its prior experience there was no reason in this case for the *amicus curiae* to believe

that its motion and brief would not be distributed immediately to the Court.

We respectfully submit that the interpretation of Rule 41 by the Clerk's office in this case works an injustice. In the absence of knowledge of the motion and brief in the instant case and because of the representations in the petition for certiorari and the reference to a "promised" *amicus curiae* brief in the opposition the individual justices of this Court may have gained the erroneous impression that the American Trial Lawyers Association had re-examined its position and had determined that the matter was not of importance. The Court in any event was deprived of the *amicus curiae's* thoughtful analysis.

The very nature of this case is one in which petitioners assert that they have been deprived of rights because of undue formalism. At the very outset, petitioner Muth brought a Jones Act action wherein she was entitled to a jury trial. However, her husband's employer, Atlass, despite personal knowledge of the conditions for access, through the device of a petition for limitation of liability which did not even allege absence of privity and knowledge, was able to convert the proceeding into an admiralty proceeding where there is no right to a jury trial. Once in admiralty, the petitioners under the former admiralty rules were prevented from taking the deposition of their husbands' employer, Atlass, in order to establish without question his privity and knowledge and consequently the lack of a foundation for the limitation proceeding. *Miner* v. *Atlass*, 363 U.S. 641. By the time that this Court amended the admiralty rules to permit the deposition, Atlass had died. Subsequently after a trial without a jury, the trial judge found in favor of petitioners here but failed to use the formalistic expressions "negligence" and "proxi-

mate cause" in his findings of fact, although requested so to do and implicit in his findings and judgment and expressed in his conclusions. The Court of Appeals was thus enabled to accept respondents' strained interpretation of the findings that the trial judge did not find proximately causative negligence on the part of the employer. When the trial judge, on remand, explained at length his original intention, the Court of Appeals refused to consider its own misinterpretation taking refuge in the law of the case rule as expounded prior to *Messenger* v. *Anderson,* 225 U.S. 436, 444 (1912).

Now this Court has denied a petition for certiorari unaware of the genuine interest of a substantial segment of the admiralty bar in this case because of a formalistic and we suggest erroneous interpretation of this Court's rules by the Office of the Clerk.

We would hope that if this Court does deny the petition for rehearing in this case that, in any event, it will give due consideration to a revision of its rules. If the Clerk's construction of the Rules controls then an *amicus curiae* that files a motion and brief under Rule 42, paragraph 1, should know with clarity that when consent is refused for any reason, even an invalid reason, that the motion and brief must be filed within ten days after the filing of the petition for certiorari in order to be filed within a *reasonable* time before consideration of the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons suggested in the brief of the American Trial Lawyers Association attached to its motion originally submitted April 27, 1967, which this Court did not previously have an opportunity to consider prior to its May 5 vote, we respectfully suggest that the Court reconsider its order denying the petition for certiorari.

Respectfully submitted,

G. KENT YOWELL
38 South Dearborn Street
Chicago, Illinois 60603

HAROLD A. LIEBENSON
EDWARD G. RASZUS
77 West Washington Street
Chicago, Illinois 60602
Counsel for Petitioners

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay. I further certify that it is restricted to substantial grounds available to petitioner not previously presented and which arose after the filing of the petition for writ of certiorari herein.

.....

G. KENT YOWELL

APPENDIX

Law Offices
KIERR AND GAINSBURGH
1718 National Bank of Commerce Building
New Orleans 70112

Jackson 2-2304

April 25, 1967

John F. Davis, Esq.
Clerk
United States Supreme Court
Washington, D. C.

Dear Sir:

Re: Estates of Muth and Darr v. Atlass, et al
Nos. 709, 733

Enclosed herewith is motion for leave to file a brief as amicus curiae on behalf of the American Trial Lawyers Association, and the brief.

We shall appreciate your presenting this motion to the Court.

Copies are being sent this day to all counsel. Also, forty additional copies are being sent to you under separate cover.

Thank you.

Sincerely yours,

/s/ Raymond H. Kierr
Raymond H. Kierr

RHK/lb

cc: Edward G. Raszus, Esq.
Harold A. Liebenson, Esq.
G. Kent Yowell, Esq.
Edward B. Hayes, Esq.
Warren E. Ingersoll, Esq.

LORD, BISSELL & BROOK
135 South La Salle Street
Chicago, Illinois 60603

Area Code 312

Telephone 346-7475

Cable Address "Lowirco"

May 2, 1967

Michael Rodak, Esq., Deputy Clerk
United States Supreme Court
Washington, D. C.

Re: Muth and Darr v. Atlass
No. 1178, October Term, 1966
Our File No. 14988

Dear Mr. Rodak:

This will confirm our telephone conversation this morning in which I advised that Mr. Edward B. Hayes, counsel for the respondents, Harriet Atlass and Chicago Title & Trust Company, did not agree to the filing of a brief of amicus curiae on behalf of the American Trial Lawyers Association, prepared by Mr. Raymond H. Kierr, which was received in this office on April 28, 1967.

It is our opinion, in which we understand that you concur, that the brief is untimely, within the contemplation of Rule 42, paragraph 2, of the Rules of the Supreme Court of the United States.

This letter will, therefore, advise you that we cannot consent to the filing of this brief and will, in due course,

present our formal objection thereto; in any event, on or before the 17th of May.

Very truly yours,

Lord, Bissell & Brook
/s/ W C Ingersoll
By: Warren C. Ingersoll

WCI:mp
cc: Mr. Raymond H. Kierr
Mr. G. Kent Yowell
Mr. Edward G. Raszus

Law Offices
YOWELL AND CESSNA
38 South Dearborn Street
Suite 1210

Chicago 60603

May 9, 1967

John F. Davis, Esq.,
Clerk of the Supreme Court of the United States,
Washington, D.C. 20543

Re: Catherine Muth, Administratrix, etc.,
et al, v. Atlass, et al, etc. #1178
October Term 1966

Dear Mr. Davis:

Receipt is acknowledged of your telegram and letter, each dated May 8, 1967, advising that the petition for writ of certiorari in the above entitled case was denied.

Would you kindly advise me whether at the time the Court considered the petition it had before it the motion of the American Trial Lawyers Association to file a brief

amicus curiae. I am troubled by the copy of the letter which we received from Lord, Bissell & Brook, a copy of which is enclosed, addressed to Deputy Clerk Michael Rodak. Particularly am I troubled by the second paragraph. At the time I received that letter I could not believe that Mr. Rodak could possibly have agreed with counsel that the amicus curiae brief was untimely under Rule 42, paragraph 2 of the Rules of the Supreme Court of the United States. That rule, of course, refers to amicus curiae briefs on the merits. Rule 42, paragraph 1, refers to amicus curiae briefs in connection with petitions for certiorari and within the contemplation of that rule the brief of the amicus curiae in this case was timely, in our opinion.

I think that the Court ought to have had the opportunity of knowing about the American Trial Lawyers motion and brief at the time it passed upon the petition. The order entered May 8th, 1967 does not refer to it and it leads me to believe that the motion and brief may have been withheld inadvertently by your office because of an erroneous impression that Rule 42, paragraph 2 was involved.

I would appreciate your advice.

Very truly yours,
/s/ G. Kent Yowell

GKY/ltv
Encl.

COPY

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

May 23, 1967

Raymond H. Kierr, Esquire
1718 National Bank of Commerce
Building
New Orleans, Louisiana 70112

Re: Muth, etc., et al. v. Atlass, et al., etc., No. 1178, O. T. 1966

Dear Sir:

Please advise this office as to what disposition this office is to make of the 40 printed copies of your motion for leave to file a brief as amicus curiae on behalf of the American Trial Lawyers Association. This motion was received on April 27th, which was one day after the petition was distributed to the Court.

Under Rule 42 of the Rules of this Court a motion for leave to file such a brief may be filed only if submitted a reasonable time prior to the consideration of the petition for a writ of certiorari. Part 3 of the aforementioned Rule provides that a party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent. Under Rule 35(4) printed motions are held for a period of twenty days so that objection may be filed to such motions. By letter dated May 2, 1967, counsel advised that office that "we cannot consent to the filing of this brief and will, in due course, present our formal objection thereto; in any event, on or before the 17th of May." As you were thereafter advised by-

this office, the petition for writ of certiorari was denied on May 8, 1967.

Very truly yours,

John F. Davis, Clerk
By
Michael Rodak, Jr.
Deputy Clerk

MRjr:lsr
cc: Warren E. Ingersoll, Esq.
G. Kent Yowell, Esq.